COURT OF APPEALS OF TEXAS, EL PASO

Primera Enterprises, Inc. d/b/a JB's Lounge v. Autrey

349 S.W.3d 167 (Tex. App.—El Paso 2011) · No. No. 08-09-00263-CV · Decided August 10, 2011

SUMMARY

The Texas Court of Appeals considered whether Primera Enterprises, Inc., doing business as JB's Lounge, established the statutory safe-harbor defense under the Texas Alcoholic Beverage Code against liability under the Dram Shop Act. The court held that JB's proved its employees had completed approved seller-training programs and that no evidence showed direct or indirect encouragement of over-service. The court sustained JB's matter-of-law challenge, reversed the judgment against it, and rendered a take-nothing judgment in its favor.

CASE DETAILS

COURT	Court of Appeals of Texas, El Paso
WRITING FOR THE COURT	David Wellington Chew, Chief Justice; Chew, C.J.; McClure, J.; Rivera, J.
JURISDICTION	Texas
DECIDED	August 10, 2011
DOCKET	No. 08-09-00263-CV
DISPOSITION	reversed
PROCEDURAL POSTURE	Appeal from a bench-trial judgment imposing liability on JB's Lounge under the Texas Dram Shop Act. JB's challenged the trial court's failure to find its statutory safe-harbor affirmative defense as a matter of law and challenged the legal and factual sufficiency of the evidence supporting liability.
STANDARD OF REVIEW	For a legal-sufficiency challenge to the failure to find an affirmative-defense issue in the appellant's favor, the court first examines the record for evidence supporting the finding while disregarding contrary evidence. If no supporting evidence exists, the court examines the entire record to determine whether the contrary proposition is conclusively established as a matter of law. The issue is sustained only when the contrary proposition is conclusively established.
PRECEDENTIAL VALUE	Published opinion
PARTIES	Primera Enterprises, Inc. d/b/a JB's Lounge v. Mark Anthony Autrey

TOPICS

dram shop liability | appellate procedure | standard of review | negligence | proximate cause

PRACTICE AREAS

Torts | Alcohol liability | Appellate procedure | Remedies

QUESTIONS PRESENTED

1. Whether JB's established as a matter of law its affirmative defense under Texas Alcoholic Beverage Code section 106.14(a).
2. Whether the evidence was legally and factually insufficient to support JB's liability under the Texas Dram Shop Act.

HOLDINGS

1. JB's established the first two elements of the statutory safe harbor by requiring its employees to attend, and showing that they attended, a commission-approved seller-training program. Because the record contained no evidence that JB's directly or indirectly encouraged the employee to over-serve Flores, the safe-harbor defense was conclusively established as a matter of law.
2. The court declined to address JB's alternative legal- and factual-sufficiency challenges because sustaining the safe-harbor issue required reversal of the judgment against JB's.

KEY QUOTATIONS

> *"Under the "safe harbor" provision, the actions of an employee in over-serving a patron "shall not be attributable to the employer if: (1) the employer requires its employees to attend a commission-approved seller training program; (2) the employee has actually attended such a training program; and (3) the employer has not directly or indirectly encouraged the employee to violate such law."*" (349 S.W.3d at 170)

> *"As there is no dispute that JB's established the first two elements of the safe harbor defense, and as there is no evidence of "encouragement" which would rebut the defense, JB's matter of law challenge on its affirmative defense must be sustained."* (349 S.W.3d at 171)

FACTUAL BACKGROUND

Sergio Flores drank at least six alcoholic drinks at JB's Lounge on May 5, 2005, continued drinking after his friends left, and drove away from the lounge at approximately 11:30 p.m. About an hour and a half later, Flores was involved in a two-car collision and admitted that he was intoxicated and at fault. JB's presented evidence that its employees, including the employees working that evening, had completed Texas Alcoholic Beverage Commission-approved seller training and were instructed not to serve intoxicated customers. The record contained no evidence that JB's directly or indirectly encouraged the employee who served Flores to violate the Dram Shop Act.

PROCEDURAL HISTORY

After a motor-vehicle collision involving intoxicated driver Sergio Flores, the other driver sued Flores and JB's Lounge for negligence, gross negligence, and violations of the Texas Dram Shop Act. Following a bench trial, the trial court found Flores and JB's proximate causes of the collision, allocated 75 percent of the negligence to Flores and 25 percent to JB's, and entered actual damages against both defendants. JB's appealed. The Court of Appeals sustained JB's matter-of-law challenge to its safe-harbor defense, declined to reach the alternative sufficiency issues, reversed the judgment against JB's, and entered a take-nothing judgment in its favor.

DISPOSITION

reversed

REMAND INSTRUCTIONS

No remand was ordered. The judgment against JB's was reversed and a take-nothing judgment was entered in JB's favor.

CASES CITED

- Five Star Intern. Holdings, Inc. v. Thomson, Inc., 324 S.W.3d 160, 165 (Tex. App.—El Paso 2010, pet. denied)
- Dow Chem. Co. v. Francis, 46 S.W.3d 237, 241–42 (Tex. 2001)
- 20801, Inc. v. Parker, 249 S.W.3d 392, 394, 398–99 (Tex. 2008)

OPINION

CHEW, J.

349 S.W.3d 167 (2011) PRIMERA ENTERPRISES, INC. d/b/a JB's Lounge, Appellant, v. Mark Anthony AUTREY, Appellee. No. 08-09-00263-CV. Court of Appeals of Texas, El Paso. August 10, 2011. *168 Cori A. Harbour, The Harbour Law Firm, P.C., El Paso, TX, for Appellant. Rodrigo V. Ramos, The Rodrigo V. Ramos Law Firm, PC, El Paso, TX, for Appellee.

Before CHEW, C.J., McCLURE, and RIVERA, JJ. OPINION DAVID WELLINGTON CHEW, Chief Justice. Primera Enterprises, Inc. d/b/a JB's Lounge ("JB's") appeals from a judgment entered in a bench trial finding that Appellant violated the Dram Shop Act. JB's raises two issues on appeal.

In Issue One, JB's argues that the trial court erred in failing to find that it had proved its "safe harbor" affirmative defense as a matter of law. In Issue Two, JB's challenges the legal and factual insufficiency of the evidence which supports its liability under the Dram Shop Act.

On May 5, 2005, Sergio Flores went out for drinks with friends. Mr. Flores began the evening with a beer, before the group moved to a nearby bar called JB's Lounge. At JB's, Mr. Flores began drinking Jack Daniels whiskey and Coca-Cola. Each time he finished one drink he ordered another one, and the waitress served him right away. By 11 p.m., when his friends left JB's, Mr. Flores had consumed at least six drinks.

After his friends left, Mr. Flores moved to the bar and continued drinking. He left JB's Lounge in his vehicle at approximately 11:30 p.m. A little over an hour and a half later, Mr. Flores was involved in a two-car automobile collision.

The other driver sued Mr. Flores and JB's Lounge for negligence, gross negligence, and violations of the Texas Dram Shop Act. JB's asserted an affirmative defense under the Safe Harbor provisions of the Texas Alcohol and Beverage Code. *169 At trial, Mr. Flores testified that he did not remember what happened during the hour and a half between leaving JB's Lounge and the collision.

He admitted that at the time of the collision, he was driving while intoxicated, and that he was at fault for the collision. Mr. Enrique Silva, the president JB's parent company, also testified at trial. According to his testimony, Mr. Silva and his employees were qualified, trained, and licensed by the Texas Alcohol and Beverage Commission ("TABC"). Every employee of JB's Lounge, including those who worked on the evening of the accident, had seller training certifications from TABC.

According to Mr. Silva, all JB's employees were trained to be vigilant for intoxicated patrons, and were instructed to refrain from serving an intoxicated customer. Employees were trained to stop serving an intoxicated customer, and were expected to call a taxi to take the patron home, if necessary. Mr. Silva further testified that if an employee continued to serve alcohol to a customer who was intoxicated to a level that he posed a danger to himself or others, that employee would be dismissed.

Mr. Silva was not personally at JB's Lounge on the night of May 5, 2005. None of the employees working at JB's Lounge that evening reported having to halt service to an intoxicated customer. The case was tried to the bench.

The court concluded that both Mr. Flores and JB's were proximate causes of the automobile collision. The trial court assigned 75 percent of negligence to Mr. Flores and 25 percent of negligence to JB's. The court also found actual damages in the amount of $93,845.28 against both Appellant and Mr. Flores, and exemplary damages in the amount of $250,000 against Mr. Flores only.

The judgment was signed and entered on September 3, 2009. JB's raises two issues on appeal. In Issue One, JB's challenges the legal sufficiency of the trial court's failure to find that it established its affirmative defense under Texas Alcohol and Beverage Code Section 106.14(a).

In Issue Two, JB's contends that the evidence is legally and factually insufficient to support the trial court's determination that the entity is liable pursuant to the Texas Dram Shop Act. We will address the issues in the order they are presented. Issue One addresses the trial court's failure to determine that JB's established its right to the affirmative defense contained in Section 106.14(a) of the Texas Alcohol and Beverage Code.

As an affirmative defense, JB's bore the burden of proving its compliance with Section 106.14 at trial. See Five Star Intern. Holdings, Inc. v. Thomson, Inc., 324 S.W.3d 160, 165 (Tex.App.-El Paso 2010, pet. denied).

To successfully challenge the legal sufficiency of the fact finder's failure to answer such an issue in its favor, the complaining party must demonstrate that the evidence establishes all vital facts in support of the issue, "as a matter of law." Dow Chem., Co. v. Francis, 46 S.W.3d 237, 241 (Tex.2001).

In reviewing a matter of law challenge, the reviewing court must first examine the record for evidence that supports the finding, while ignoring all evidence to the contrary. Francis, 46 S.W.3d at 242. If there is no evidence to support the finding, then the reviewing court will examine the entire record to determine if the contrary proposition is established as a matter of law.

Id. The issue should be sustained only if the contrary proposition is conclusively established. Francis, 46 S.W.3d at 242. The trial court found Appellant negligent in violating the Dram Shop Act. The Dram Shop Act imposes liability on providers of alcohol for the actions of intoxicated *170 customers if: (1) at the time of the provision it was apparent to the provider that the customer was obviously intoxicated to the extent that he presented a clear danger to himself and others; and (2) the intoxication of the customer was a proximate cause of the damages suffered See TEX.ALCO.BEV.CODE ANN. § 2.02(b)(West 2007).

However, the Act also contains a section eliminating this liability under certain circumstances. See TEX. ALCO.BEV.CODE ANN. § 2.02(b); TEX. ALCO.BEV.CODE ANN. § 106.14(a)(West 2007). Under the "safe harbor" provision, the actions of an employee in over-serving a patron "shall not be attributable to the employer if: (1) the employer requires its employees to attend a commission-approved seller training program; (2) the employee has actually attended such a training program; and (3) the employer has not directly or indirectly encouraged the employee to violate such law."

TEX. ALCO.BEV.CODE ANN. § 106.14(a). The provision intends to provide a broad shelter from liability for a provider who has complied with the first two elements while also ensuring that this shelter not be abused. 20801, Inc. v. Parker, 249 S.W.3d 392, 398 (Tex.2008).

As such, Section 106.14(a) has been interpreted to include both an affirmative defense, contained in the first two elements, as well as a potential rebuttal to that defense if the claimant can demonstrate that the employer directly or indirectly encouraged the server to continue to serve an intoxicated patron. See Parker, 249 S.W.3d at 398. Encouragement may be shown, at the minimum, by evidence of the provider's negligence.

Id. at 394. By comparison, "negligence" in Dram Shop cases implies that the provider has engaged in behavior that a reasonable provider would not have done under the same or similar circumstances, or the provider has failed to do what a reasonable provider would have done under the same or similar circumstances. Parker, 249 S.W.3d at 398.

The circumstances that should be taken into consideration include a provider's awareness of, and reliance on, its employees' successful completion of an approved seller training program. Id. For example, a provider might, without so intending, encourage its employees to over-serve by serving obviously intoxicated persons himself and thus modeling inappropriate behavior, or by failing to punish over-service, or by setting an excessively high minimum sales quota without regard to the number of patrons.

Id. However, a provider, after having otherwise met its burden under Section 106.14(a), is not required to demonstrate enforcement on the occasion giving rise to the cause of action. Parker, 249 S.W.3d at 399. There is no dispute in the case before us that JB's established the first two elements, of Section 106.14(a). Every employee of JB's Lounge, including those who worked on the evening in question, had seller training certifications from TABC.

Having established those elements at trial, the burden shifted to the negligence claimant to prove that JB's directly or indirectly encouraged the employee who served Mr. Flores to violate the Dram Shop Act. See Parker, 249 S.W.3d at 394.

The record is silent on this issue. There was neither direct evidence that JB's knowingly ordered or rewarded over-service, nor circumstantial evidence that he engaged in behavior which a reasonable provider under the same or similar circumstances should have known would constitute encouragement. See id. at 398.

As there is no dispute that JB's established the first two elements of the safe harbor defense, and as there is no evidence of "encouragement" which would rebut the defense, JB's matter of law challenge on *171 its affirmative defense must be sustained. See Parker, 249 S.W.3d at 394.

Accordingly, Issue One is sustained. Having sustained Issue One, we decline to address the alternative legal and factually sufficiency arguments raised in Issue Two. Having sustained Issue One, the trial court's judgment as to Appellant will be reversed and a take-nothing judgment will be entered in JB's favor.